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# **Webinar: COVID-19 Business Insurance Claims**

Presented by Taft and KPMG

April 2, 2020

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**Taft/**

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# Presenters



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# COVID-19 Impact To Businesses

- Supply chain disruptions
- Employees (absent, can also spread the virus)
- Government orders cancelling events, limiting gatherings, closing businesses, and imposing quarantines
- Lost earnings (cancelled contracts)
- Continuing expenses (rent, payroll, etc.)
- Extra expenses (robust disinfection, laptops)
- Reputational damage

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# First Party Coverages

- First party coverages that can offset your losses:
  - Supply chain / trade disruption
  - Event cancellation
  - Travel insurance
  - Property damage
  - Business interruption
  - Contingent business interruption (suppliers/distributors)
  - Extra expense
  - Civil authority, ingress/egress
  - Crisis management
  - Loss analysis

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# Interpreting Insurance Policies

- Canons of insurance contract interpretation:
  - Policy is construed as a whole with due regard to the risk undertaken, the subject matter that is insured, and the purposes of the entire contract
  - If words are unambiguous, a court will give them their plain, ordinary, and popularly understood meaning by average person
  - If words in the policy are reasonably susceptible to more than one interpretation, they are ambiguous and must be strictly construed in favor of the policyholder and against the insurer who drafted the policy
  - There is a strong presumption against provisions / exclusions that easily could have been included in the contract but were not

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# Business Interruption Insurance

- Covers loss of earnings and continuing expenses
- Requires:
  1. Property damage, meaning “direct physical loss or damage” to insured property;
  2. Caused by a “covered cause of loss;” and
  3. Covered losses and damages

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# Business Interruption Insurance

- Then it covers:
  4. Net income that would have been earned;  
and
  5. Continuing normal operating expenses incurred, including payroll

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# Was It Caused By A “Covered Cause Of Loss”?

- There are two types of coverages:
  - “All risks” policies – covers losses unless specifically excluded
  - “Named peril” policies – covers losses for specifically named perils, e.g., fire, windstorm, earthquake, etc.
- Generally easier to obtain coverage under an “all risks” policy



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# Is There Property Damage?

- Usually requires “direct physical loss or damage”
  - Controlling state law determination
  - Is the property contaminated, uninhabitable, or unfit for its intended use?
  - “Direct physical loss or damage” has been found for
    - Asbestos dust
    - Fumes from spilled ammonia and gasoline
    - Mold
    - Off-gassing of sulfur from Chinese drywall
  - Case-by-case determination

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# How Do You Prove “Direct Physical Loss or Damage” From a Virus?

- Testing surfaces
- Expert testimony
  - State or Local Health Department (Orders)
  - Certified Industrial Hygienist
  - Medical Doctor
  - Infectious Disease Specialist
- Circumstantial evidence (e.g., infected employee)

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# SARS Coronavirus Persisted on Surfaces for 28 Days

APPLIED AND ENVIRONMENTAL MICROBIOLOGY, May 2010, p. 2712-2717  
0099-2240/10/\$12.00 doi:10.1128/AEM.02291-09  
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## Effects of Air Temperature and Relative Humidity on Coronavirus Survival on Surfaces<sup>∇</sup>

Lisa M. Casanova,<sup>1\*</sup> Soyoung Jeon,<sup>2</sup> William A. Rutala,<sup>3</sup> David J. Weber,<sup>3</sup> and Mark D. Sobsey<sup>1</sup>

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Received 23 September 2009/Accepted 26 February 2010

Assessment of the risks posed by severe acute respiratory syndrome (SARS) coronavirus (SARS-CoV) on surfaces requires data on survival of this virus on environmental surfaces and on how survival is affected by environmental variables, such as air temperature (AT) and relative humidity (RH). The use of surrogate viruses has the potential to overcome the challenges of working with SARS-CoV and to increase the available data on coronavirus survival on surfaces. Two potential surrogates were evaluated in this study; transmissible gastroenteritis virus (TGEV) and mouse hepatitis virus (MHV) were used to determine effects of AT and RH on the survival of coronaviruses on stainless steel. At 4°C, infectious virus persisted for as long as 28 days, and the lowest level of inactivation occurred at 20% RH. Inactivation was more rapid at 20°C than at 4°C at all humidity levels; the viruses persisted for 5 to 28 days, and the slowest inactivation occurred at low RH. Both viruses were inactivated more rapidly at 40°C than at 20°C. The relationship between inactivation and RH was not monotonic, and there was greater survival or a greater protective effect at low RH (20%) and high RH (80%) than at moderate RH (50%). There was also evidence of an interaction between AT and RH. The results show that when high numbers of viruses are deposited, TGEV and MHV may survive for days on surfaces at ATs and RHs typical of indoor environments. TGEV and MHV could serve as conservative surrogates for modeling exposure, the risk of transmission, and control measures for pathogenic enveloped viruses, such as SARS-CoV and influenza virus, on health care surfaces.

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Environmental surfaces have been recognized as likely contributors to the transmission of nosocomial viral infections (25). The question of whether hospital surfaces play a role in

challenges and expand the available data on coronavirus survival on surfaces.

In addition to SARS-CoV, there are two pathogenic human

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# Coronavirus genetic material stayed on surfaces for up to 17 days on Diamond Princess cruise, CDC says

**[David Oliver](#)** USA TODAY

Published 7:51 a.m. ET Mar. 24, 2020 | Updated 6:11 p.m. ET Mar. 26, 2020

The CDC noted there was coronavirus RNA, or genetic material, found on surfaces in the cabins of both symptomatic and asymptomatic infected passengers on the [Diamond Princess](#) cruise ship – 17 days after passengers had left the cabins. Of note, the cabins had yet to be disinfected.

While the data doesn't show if transmission of the virus occurred from surfaces, the CDC report recommends exploring that further.

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# Business Interruption Proof

- Secondary evidence

## Coronavirus cases surge to 2,159 in state, 964 in Marion County

The Indiana State Department of Health reported that 13,373 people have been tested so far, up from 11,658 in Monday's report. [More](#)

See [https://www.ijb.com/articles/coronavirus-cases-surge-to-2159-in-state-964-in-marion-county?utm\\_source=news-update&utm\\_medium=newsletter&utm\\_campaign=2020-03-31](https://www.ijb.com/articles/coronavirus-cases-surge-to-2159-in-state-964-in-marion-county?utm_source=news-update&utm_medium=newsletter&utm_campaign=2020-03-31).

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# Business Interruption Proof

## BMO Plaza worker has COVID-19, landlord says

March 20, 2020 | Greg Andrews

The 28-story BMO Plaza office tower downtown informed tenants on Friday that an employee of one of the companies in the building has a confirmed case of COVID-19, the illness caused by the novel coronavirus.

In an email to tenants, the building manager did not identify the tenant but said it was below the 18th floor. It said the employee has not been in the building since March 12.

The email said that since March 9, cleaning personnel have been using “enhanced cleaning” practices on the building’s heavily touched surfaces, such as elevator buttons, door handles, water fountains and handrails. It also said that the affected tenant—which has temporarily closed—has hired a janitorial contractor to perform a deep disinfection on the affected floor or floors.

See <https://www.ibj.com/articles/bmo-plaza-worker-has-covid-19-landlord-says>.

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# Business Interruption Proof

- Keep track of employee and nearby COVID-19 cases to prove property damage within the required distances; e.g., news articles, local health department records, etc.
- Track your losses, added costs, and extra expenses
- Keep an up-to-date journal of daily events

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# Contingent Business Interruption

- Covers losses resulting from perils affecting your suppliers, distributors, and customers
- Requires:
  1. Physical damage to property of a type insured under the policyholder's policy
  2. To a supplier, distributor, or customer
  3. By a covered cause of loss under the insured's policy
  4. Which caused an interruption to the policyholder's business



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# Contingent Business Interruption

- Then it covers:
  5. The business interruption loss as specified in the policyholder's policy;
  6. For the defined indemnity period or policy limits.

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# Extra Expense

- Covers reasonable and necessary additional costs of doing business because of property damage caused by an insured peril
  - Substitute goods, added delivery costs, overtime
  - Added expenses for working remotely (laptops)

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# Exclusions

- Case-by-case determination; ambiguous or vague exclusions are less likely to be enforced
- Examples
  - Pollutant
  - Microorganism
  - Pathogen or virus
  - Severe Acute Respiratory Syndrome (SARS)
- Some Society Insurance Business Owners policies omit a virus exclusion!

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# Legislative Efforts to Rewrite Policies

- Proposed legislation to rewrite policies to require insurers to cover business interruption losses resulting from COVID-19 and remove exclusions
- Group of bipartisan members of Congress wrote insurer industry group without success, but there are state legislative efforts:
  - New Jersey (withdrawn)
  - New York, Massachusetts, and Ohio (pending)
- Subject to constitutional challenge

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# Civil Authority Coverage

- Generally covers loss due to a governmental order prohibiting access to insured premises. Usually requires that the civil order results from physical injury to premises of the insured or third-parties adjacent to or within a specified distance.
- Often kicks in only if access is prohibited for a minimum time and only for a limited time thereafter.

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# Policy Language Varies Widely

- **Example #1**
  - Covers loss “caused by action of civil authority that prohibits access to the [insured] property due to direct physical loss of or damage to property, other than the [insured premises], caused by or resulting from any” covered peril.

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# Policy Language Varies Widely

- **Example #2**

- Covers loss the insured “incur[s] due to actual impairment of [its] operations; and extra expense [it] incur[s] due to actual or potential impairment of [its] operations , directly caused by the prohibition of access to [its] premises, or dependent business premises by a civil authority.” “This prohibition of access by civil authority must be the direct result of physical loss or damage to property or dependent business premises” within 5 miles. “Dependent business premises” includes suppliers and customers.

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# Prohibition on Access to Premises

- Civil Authority Coverage usually requires that order “prohibit access” to insured premises.
- Orders that do not expressly prohibit access, even if the effect of the order is to deny access, may not suffice.
  - Courts have reached mixed results on whether curfew orders related to riots or natural hurricane evacuation orders “prohibit access.”<sup>1</sup>
  - 9/11 airspace shutdown order was not found to constitute a prohibition on access to hotels.<sup>2</sup>

<sup>1</sup>*Sloan v. Phoenix Hartford, Ins. Co.*, 207 N.W. 2d 434 (Mich. 1973)(curfew due to riots in city sufficient to constitute prohibition on access); *Syufy Enterprise v. Home Ins. Co.*, 1995 U.S. Distr. LEXIS 3771 (N.D. Cal. 1995)(curfew due to riots not sufficient to constitute prohibition on access to adjacent property).

<sup>2</sup>*Southern Hospitality, Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137(10<sup>th</sup> Cir. 2004)



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# Prohibition on Access to Premises

- Helpful to businesses if an order not only directs people to stay home, but also prohibits public access to specific types of premises (even if an order allows access for limited purposes).

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## Order Usually Must Result from Physical Loss or Damage to Insured or Third-Party Premises

- Policies vary on how close the third-party premises must be.
  - Some contain no geographic restriction, though even then distant damage from same cause may not suffice.<sup>3</sup>
  - Where policy requires that the damaged third-party premises must be “adjacent” or a specified distance, may be interpreted literally.<sup>4</sup>

<sup>3</sup>*Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F. 3d 683 (6<sup>th</sup> Cir. 2011)(Order to evacuate New Orleans in advance of Hurricane Katrina was insufficient even though third-party property in Caribbean had already been damaged).

<sup>4</sup>*United Air Lines, Inc. v. Ins. Co. of the State of PA.*, No. 17-cv-23362, 2018 WL 3412974 (S.D. Fl. June 11, 2018).

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## Order Usually Must Result from Physical Loss or Damage to Insured or Third-Party Premises

- Usually a Nexus is Required Between Order and the Physical Loss or Damage to Third-Party Property
  - Orders that do not specify that the reason access is prohibited is due to physical loss or damage can be problematic.<sup>5</sup>
  - Order issued prior to physical damage to adjacent third-party property may not trigger coverage even if some physical injury to property has already taken place. *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128(2<sup>nd</sup> Cir. 2006)(Even if Pentagon constituted “adjacent property” to airport, no coverage because closure order issued before Pentagon damaged.)

<sup>5</sup>*Two Caesars Corp. v. Jefferson Ins. Co.*, 280 A.2d. 305. (curfew order following riots which were intended to provide access to first responders was not due to physical loss or damage to third-party property).

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# Example of Lockdown Order (Selected Randomly)

- **Illinois Executive Order No. 7**
  - Includes the following language “Whereas, frequently used surfaces in public settings, including bars and restaurants, if not cleaned and disinfected frequently and properly, also pose risk of exposure. ... [A]ll businesses in State of Illinois that offer food or beverages for on-site premises consumption ... must suspend service for ... on-site consumption... . In addition, customers may enter premises to purchase food ... for carryout. However, establishments ... must ensure that they have an environment where patrons maintain ... social distancing.”

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# Possible Civil Order Language Changes

- Courts are unlikely to question specific statements in civil orders.
- Helpful if orders don't just direct residents to "stay home" but describe limitations on access to property.
- State the access prohibition in the affirmative. In other words, prohibit public access to property and then note exceptions such as picking up food (rather than converse).

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# Possible Civil Order Language Changes

- Expressly state that part of reason for prohibiting access is presence of virus at places within the jurisdiction.
- Recite specific finding of health authorities as to extent of presence of virus on surfaces and some information about location of those with Covid-19 if available.
- Even if original orders here did not provide the above, reissuance of orders that contain the above will assist in recovery of losses suffered after new order.

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# Other Ways Governmental Authorities Can Assist Business in Obtaining Civil Authority Coverage

- Test surfaces in public and other locations and make data available and include in orders.
- Make findings on likelihood that presence of victims with Covid-19 also means virus is present on building surfaces.
- Liberalize FOIA process (to extent does not identify PII) so that insureds can show that Covid-19 was present within distance required under policies.

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# Notice

- Two different notice deadlines in typical policies.
- Initial notice usually must be given “as soon as possible.”
  - Sometimes strictly enforced, though many jurisdictions offer relief from this requirement.
- Must file a sworn proof of loss within a specific time after initial notices
  - Often strictly enforced.
  - Carriers will often give extension of time to file the proof of loss.



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# How to Present Your Claim

- Gather your policy
- Take steps to preserve documentation and evidence needed to prove claim.
- Review proposed claim and notice with your legal advisor.
- While you may opt to have your broker deliver notice, be sure to confirm notice has been given.

# What actions should organizations consider now?

The first priority in preparing for and responding to a crisis of this nature should always be the safety and well-being of family members, friends, colleagues, employees, and other members of our communities.

Business owners should focus on economic recovery, which includes the challenge of compiling and dealing with complex insurance claims related to losses sustained at their facilities, extra expenses incurred, and business interruption losses driven by the disruptive and overwhelming impact of COVID-19

Review and understand applicable insurance policies and related provisions

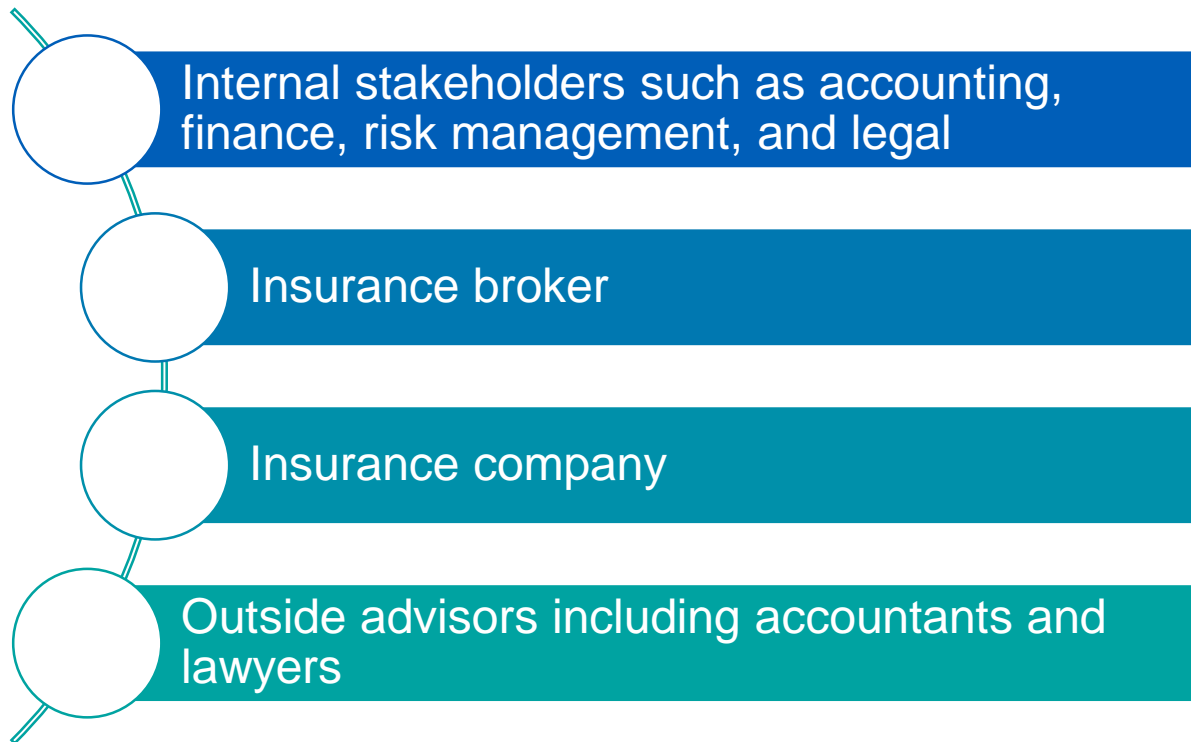
Establish and maintain separate GL accounts and time codes to track expenses and time

Retain documentation to evidence extra expenses

Gather documentation and data related to historical business performance as well as projections for future performance

Reassure vendors, suppliers, and customers and elicit a vote of confidence from employees

# Who are the key parties to communicate with?



# What are the key issues to consider during the loss period?

**Expenses incurred associated with preparing and responding to COVID-19**

**Mitigation of damages during loss periods**

**Coverage for expediting expenses**

**Capturing costs incurred while returning to normal operations**

**Evaluation and documentation of COVID-19 costs**

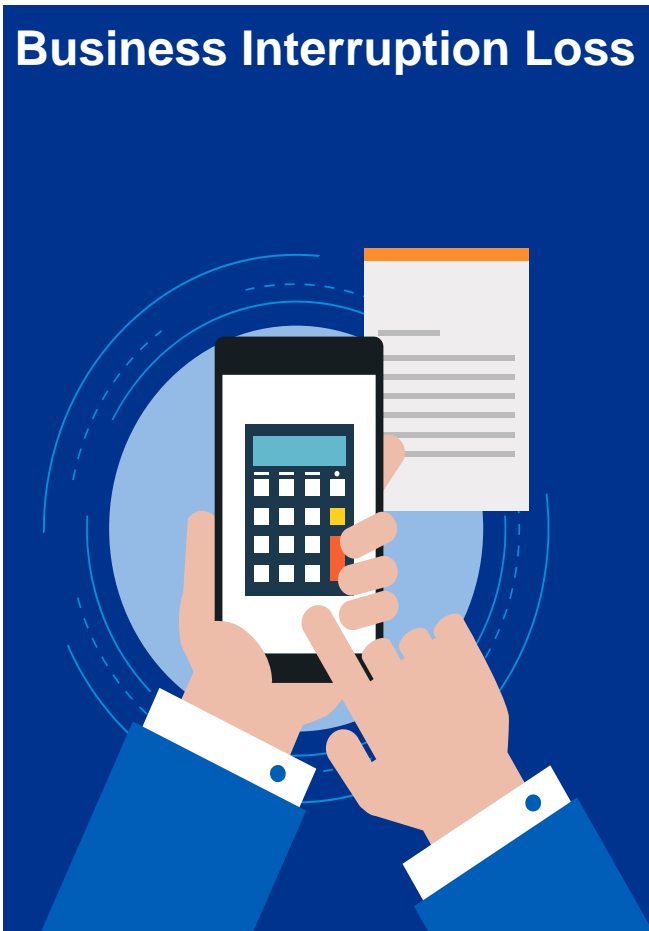
**Providing supporting documentation for claim presentation and settlement**

**Communications with your insurance carrier and their consultants**



# What types of insurance claims may stem from COVID-19?

## Business Interruption Loss



Evaluate the lost profits and sales during the period of loss

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Evaluate and analyze industry data, market demand, and trends

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Understand and evaluate direct and indirect cost savings

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Understand and evaluate key supplier and key customer loss

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Review historical operational financial records and prepare financial projections

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Prepare business interruption valuation report

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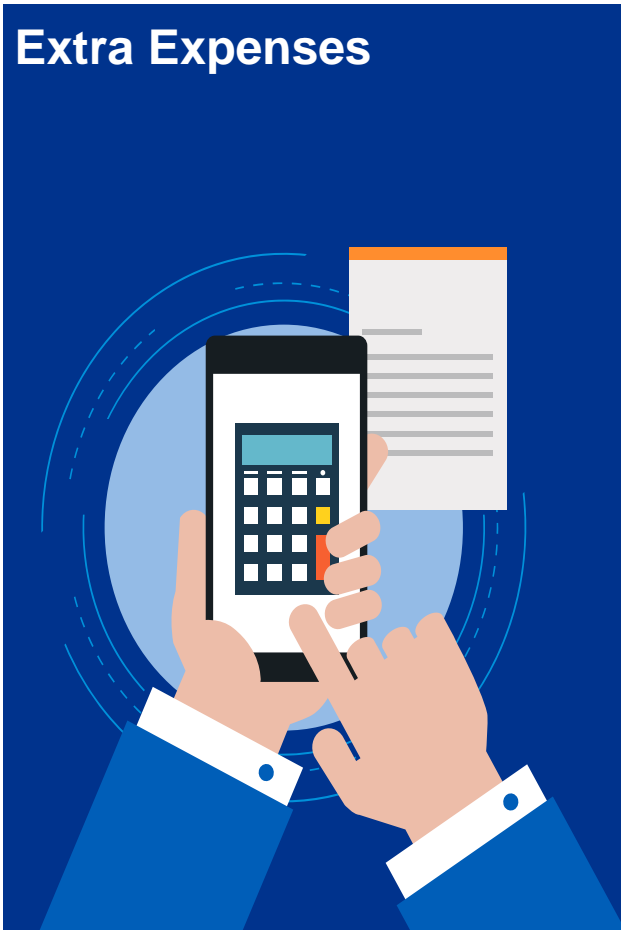
Calculate business interruption damages solely attributable to COVID-19

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Present and support claim

# What types of insurance claims may stem from COVID-19?

## Extra Expenses



Compile and verify additional costs incurred as a result of the incident and costs to mitigate the incident

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Set up ERP and accounting systems to track additional costs incurred as a result of the incident

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Identify period and limit of indemnity

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Review and analyze expenses incurred during the period of restoration

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Compile and organize extra expenses and the supporting documentation

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Quantify incremental personnel expenses (e.g. overtime, and any additional expenses for hourly employees)

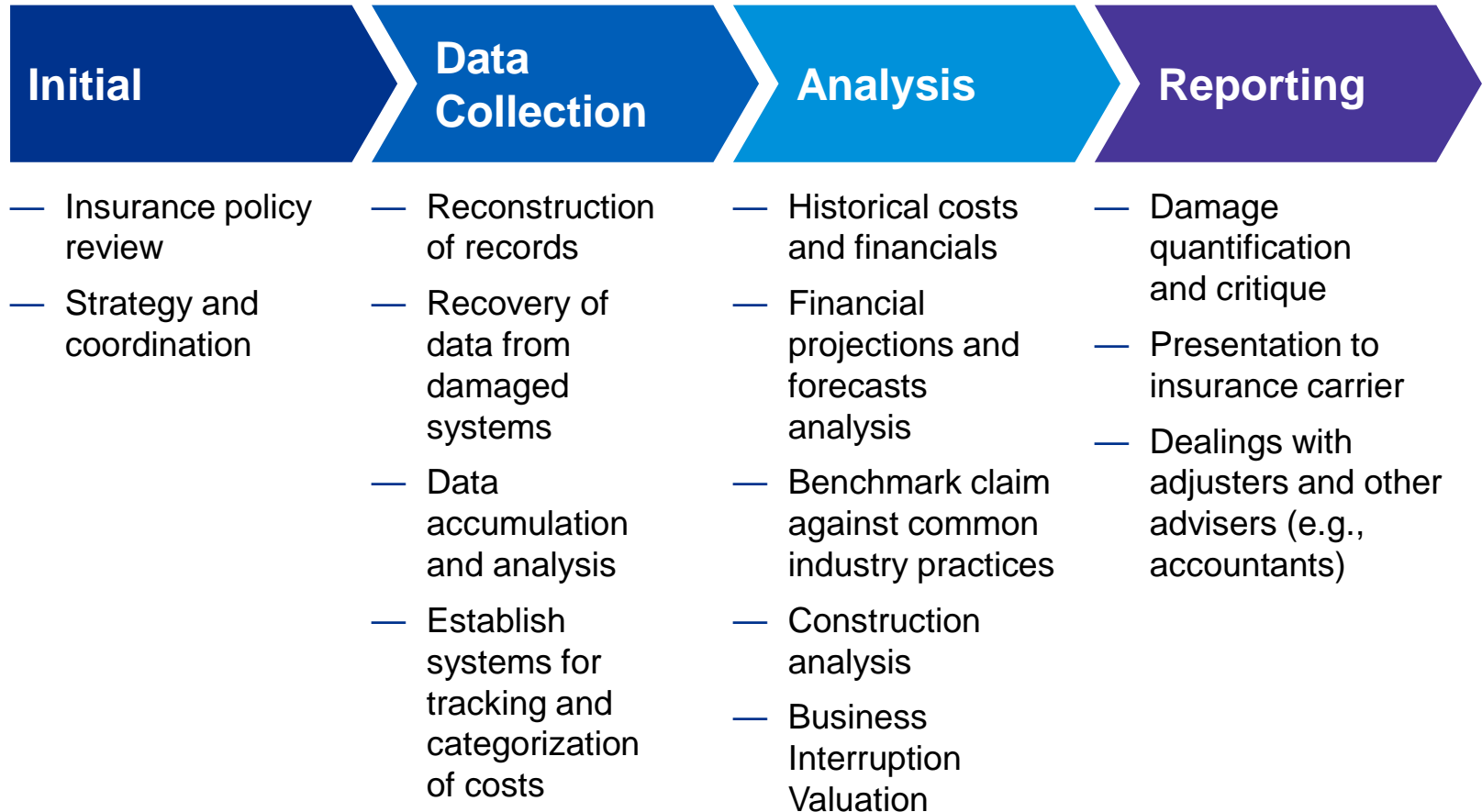
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Identify potential residual value

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Present and support claim

# What is the typical claims process?



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# Questions? Contact Us:



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